

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

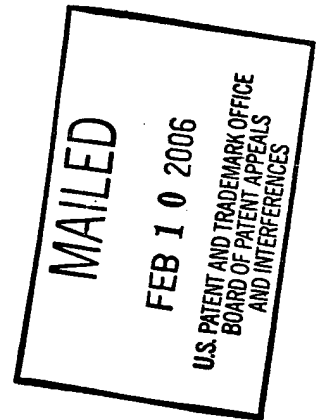
UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte BRIAN GALLAGHER

Appeal No. 2006-0709
Application No. 10/780,805

ON BRIEF



Before KIMLIN, WARREN and FRANKLIN, Administrative Patent Judges.
KIMLIN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-10.
Claims 1 and 7 are illustrative:

1. A training bat comprising:

a barrel section having a first diameter, said first diameter being less than 2 1/4 inches;

a transition section having first and second ends, said transition section having a decreasing diameter from said first end to said second end, said first end being operatively connected to said barrel section where said diameter of said first end is substantially equivalent to said first diameter of said barrel section; and

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a handle section having a first end with a second diameter, said first end of said handle section being operatively connected to said second end of said transition section where said diameter of said first end of said handle section is substantially equivalent to said second end of said transition section;

wherein said training bat has a length and a weight which are substantially equivalent to the length and weight of a respective conventional Little League, baseball, or softball bat.

7. The training bat of claim 1 further comprising an elongated rod in a drilled out portion of said barrel section.

The examiner relies upon the following references as evidence of obviousness:

Owen et al. (Owen)	3,116,926	Jan. 7, 1964
Muhlhausen	6,050,908	Apr. 18, 2000
Brundage	6,280,353	Aug. 28, 2001

Appellant's claimed invention is directed to a training bat having a barrel section, a handle section and a transition section joining the barrel and handle sections. The bat has a length and weight substantially equivalent to that of a conventional Little League, baseball or softball bat, but the diameter of the barrel section is less than 2 1/4 inches, which is less than that of the conventional bats. Claim 7 on appeal recites an elongated rod in a drilled out portion of the barrel section. According to appellant, "the training bat of the

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present invention enables a ball player to swing a bat having conventional and weight dimensions, yet the reduced diameter barrel enhances the visual acuity of the batter when used repeatedly to strike the ball" (Page 2 of principal brief, last paragraph).

Appealed claims 1-6 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Owen in view of Muhlhausen. Claims 7-10 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Brundage in view of Muhlhausen.

We have thoroughly reviewed each of the appellant's arguments in the principal and reply briefs on appeal. However, we are in complete agreement with the examiner that the claimed subject matter would have been obvious to one of ordinary skill in the art within the meaning of Section 103 in view of the applied prior art. Accordingly, we will sustain the examiner's rejections for essentially those reasons expressed in the answer, and we add the following primarily for emphasis.¹

We consider first the rejection of claims 1-6 over Owen in view of Muhlhausen. Owen, like appellant, discloses a training

¹Since appellant has not advanced separate arguments for any particular claim on appeal, separately rejected claims 1-6 stand or fall together, as do claims 7-10.

bat for improving the ability to hit a ball. The bat of Owen comprises the presently claimed barrel, transition and handle sections. As recognized by the examiner, the barrel section of Owen's bat does not have a diameter less than 2 1/4 inches, as presently claimed. However, as correctly pointed out by the examiner, Owen expressly teaches that the bat may vary in diameter, length and weight. Hence, although the smallest diameter of the barrel section disclosed by Owen is 2 1/4 inches, we are convinced that it would have been obvious for one of ordinary skill in the art to make the barrel section of Owen's bat have a diameter of slightly less than 2 1/4 inches, which is all that is required by claim 1 on appeal. It is well settled that, where patentability is predicated upon a change in a condition of the prior art, such as a change in size, the applicant must establish that the change is critical, i.e., it leads to an unexpected result. In re Woodruff, 919 F.2d 1575, 1578, 16 USPQ2d 1934, 1936 (Fed. Cir. 1990) and In re Aller, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955).

In the present case, appellant has proffered no objective evidence which establishes that a bat having a barrel section slightly smaller in diameter than a conventional bat produces an

unexpected result. Moreover, we concur with the examiner that Muhlhausen evidences that it was known in the art to make the portion of the bat which contacts the ball smaller in order to enhance eye-to-hand coordination. Accordingly, although the contacting portion of Muhlhausen's bat is not cylindrical, we agree with the examiner that one of ordinary skill in the art would have found it obvious to apply the principle disclosed by Muhlhausen in designing the barrel section of a conventional bat in order to improve the visual acuity of the batter.

Appellant contends that "*Muhlhausen* does not teach or otherwise suggest that the length and weight of the overall training bat 10 is substantially equivalent to the length and weight of a conventional bat" (page 4 of principal brief, second paragraph). However, the examiner does not cite Muhlhausen for such a teaching of a conventional bat. It is Owen that teaches a bat of conventional size, and the rationale of the rejection is that it would have been obvious to modify the conventional-sized bat of Owen in accordance with the teaching of Muhlhausen regarding the size of the contact portion of the bat.

We are also not persuaded by appellant's argument that "one of ordinary skill in the art would not consider modifying the

diameter of the barrel section of *Owen* in view of *Muhlhausen* to obtain the bat of claims 1 or 4 because *Owen* is concerned with strength development, not visual acuity" (page 4 of principal brief, third paragraph). We agree with the examiner that one of ordinary skill in the art would have found it obvious to incorporate the principle underlying the bat of *Muhlhausen* into the design of *Owen* in order to enhance visual acuity as well as strength.

We also do not subscribe to appellant's argument that "[i]f the barrel section of the *Owen* were made narrower, there would be no wood left in the barrel section because the chamber 13 must accommodate the weights 15 in *Owen*." *Id.* We are satisfied that one of ordinary skill in the art would have had the wherewithal to select appropriately sized weights to fit in the smaller barrel section. Again, we emphasize that the barrel section of *Owen* need only to be slightly reduced in diameter to meet the requirements of claim 1.

Turning to the rejection of claims 7-10 over *Brundage* in view of *Muhlhausen*, we agree with the examiner that it would have obvious for one of ordinary skill in the art to design the barrel

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section of Brundage's weighted bat to have a slightly smaller diameter to enhance the visual acuity of the batter in training. While Brundage is silent regarding the diameter of the barrel section for the training bat, Muhlhausen, as discussed above, evidences that it was known in the art to reduce the size of the contact portion of the bat to enhance eye-to-hand coordination. Appellant's argument that Brundage does not address the goal of enhancing visual acuity is not persuasive for the same reason set forth above with respect to the Owen reference.

As a final point, we note that appellant bases no argument upon objective evidence of nonobviousness, such as unexpected results, which would serve to rebut the prima facie case of obviousness established by the examiner.

In conclusion, based on the foregoing, and the reasons well-stated by the examiner, the examiner's decision rejecting the appealed claims is affirmed.

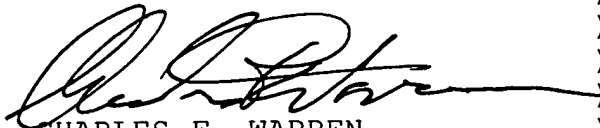
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No time period for taking any subsequent action in
connection with this appeal may be extended under 37 CFR
§ 1.136(a)(1)(iv).

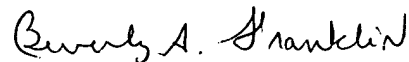
AFFIRMED



EDWARD C. KIMLIN
Administrative Patent Judge



CHARLES F. WARREN
Administrative Patent Judge



BEVERLY A. FRANKLIN
Administrative Patent Judge

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